IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.979 OF 2007

Sampat T. Jadhav ...Petitioner

Versus

Smt Laxmibai Tatyaba Jadhav & Ors ...Respondents

Shri S.K.Shinde i/by Shri Vinod Shah for the Petitioner.
Shri R.M.Hardas i/by Shri P.N.Joshi for the Respondent No.2.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 25, 2007.

P.C.:

1. Heard Advocates appearing for the parties. Considering the nature of the impugned order, Writ Petition is taken up for final hearing. Shri Hardas is representing the second Respondent who is the original second Plaintiff. The first Respondent who is the original first Plaintiff is already dead. The third Respondent is one of the Defendants and hence, service of notice to the third Respondent is not necessary.

2. The first and second Respondents filed a suit for partition and separate possession. The suit was decreed by judgment and decree dated 22nd August, 2006. The trial Court held that the first Plaintiff was entitled to 4/9th share and the second Plaintiff was entitled to get 1/9th share. It was further declared that the second Plaintiff will be entitled to total 5/9th share inclusive of 4/9th share of the first

Plaintiff which was given by her to the second Plaintiff by a Will. The decree was ordered to be sent to the Collector for effecting partition as required by section 54 of the Code of Civil Procedure, 1908.

3. The present Petitioner preferred an Appeal for challenging the said decree. By Judgment and Order dated 18th January, 2007 the learned District Judge-I, Nasik stayed execution of decree subject to Petitioner furnishing cash security of Rs.50,000/- which was to be deposited in fixed deposit in the name of the second Respondent and the second Respondent was permitted to withdraw the interest accrued thereon. It is this order which is impugned in the present Petition under Article 227 of the Constitution of India.

4. The learned counsel appearing for the Petitioner submitted that the order for furnishing cash security was uncalled for considering the fact that the decree was for partition and separate possession. He submitted that without there being any prayer made by the second Respondent, she has been permitted to withdraw the interest accrued on the amount. The learned Advocate for the second Respondent submitted that since the second Respondent is kept away from the properties in which she has a substantial share, the Appellate Court was justified in passing the order impugned. He submitted that in any case the second Respondent is

entitled to claim maintenance.

5. I have considered the submissions. Under Rule 5 of Order XLI of the Code of Civil Procedure, 1908 there is a power vesting in the Appellate Court to grant stay subject to condition of security being furnished by the Appellant. In the present case, the decree is for partition and separate possession. Instead of granting blanket stay the learned District Judge could have directed that the partition proceedings will go on while protecting the actual physical possession of the parties. Considering nature of the decree, the order directing furnishing of the cash security in the sum of Rs.50,000/- was not at all warranted. There was no application made by the second Respondent for grant of any maintenance and therefore, the direction given for permitting the second Respondent to withdraw the interest could not have been passed by the Appellate Court.

6. Therefore, the impugned order deserves to be modified. The second Respondent who is held entitled to substantial share in the property can always take out appropriate Application for grant of appropriate relieef and the Appellate Court is bound to decide said Application in accordance with law.

7. Hence, I pass the following order:

(i) The impugned Judgment and Order is modified. The operative part of the impugned order dated 18th January, 2007 will now read as under:

"(a) Till the final disposal of the Appeal, the partition proceedings on the basis of the impugned decree will go on. However, actual physical partition by metes and bounds shall not be effected till the final disposal of the Appeal.

(b) There will be no orders as costs."

(ii) The modification made as aforesaid will not prevent the second Respondent from making appropriate application as indicated in the judgment. If such application is made, the Appellate Court will decide the same expeditiously on its own merits.

(iii) Writ Petition is partly allowed in above terms with no orders as to costs.

(iv) All contentions of the parties on the merits of the Appeal are expressly kept open.

(v) Hearing of the Appeal is expedited.

JUDGE